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Supreme Court, U.S.
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No. 90-1525

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PAC-TEC, INC.,
Cross Petitioner,

vs.

OWEN E. PERRY,
Cross Respondent/Petitioner,

and

AMERACE CORPORATION, *Respondent.*

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Note: The first two of the following questions are among the four questions raised in the original Petition for Certiorari, and have been incorporated by reference in the Cross-Petition.

1. Whether the words "frivolous," "just damages," and "an appeal" in Rule 38 are so lacking in meaning or articulated standards as to be void for vagueness under the Due Process Clause?

2. Whether due process of law requires notice and a hearing before substantial monetary sanctions and harsh public censure can be imposed under Rule 38?

3. If this Court decides that an order of sanctions against a lawyer is invalid, whether that holding would logically relieve the client of joint and several liability under the same invalid order?

4. Whether the Cross-Petitioner is precluded from raising a question of interpretation under Rule 38 that it failed to raise and preserve in the court below?

REASONS FOR GRANTING THE CROSS-PETITION IN PART AND DENYING IT IN PART

I. FOR THE REASONS STATED IN THE ORIGINAL PETITION AND INCORPORATED BY REFERENCE IN THE CROSS-PETITION, (1) RULE 38 IS UNCONSTITUTIONALLY VAGUE AND (2) DUE PROCESS REQUIRES NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE SANCTIONS CAN BE IMPOSED.

II. BECAUSE A DECISION HOLDING THE SANCTIONS ORDER INVALID WOULD NECESSARILY RELIEVE THE CROSS-PETITIONER OF ITS JOINT AND SEVERAL LIABILITY UNDER THE SAME INVALID ORDER, IT IS UNNECESSARY TO GRANT A WRIT OF CERTIORARI ON THIS ISSUE.

III. A WRIT OF CERTIORARI SHOULD BE DENIED ON THE ISSUE OF WHETHER RULE 38 PERMITS A COURT OF APPEALS TO AWARD SANCTIONS AGAINST THE CLIENT AS WELL AS AGAINST THE LAWYER, BECAUSE THE CROSS-PETITIONER FAILED TO RAISE AND PRESERVE THIS ISSUE IN THE COURT BELOW.

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COUNTERSTATEMENT OF THE CASE

Petitioner Owen E. Perry is a lawyer who was held jointly and severally liable with Cross-Petitioner Pac-Tec (his former client) for $134,000 in sanctions under Rule 38.

Among other issues that Perry has raised in his Petition are (1) that his appeal in the court below was arguable and therefore not in fact "frivolous," and (2) that sanctions should not be imposed in any event or, at least, should be mitigated, because of his good faith belief that his appeal was not "frivolous."

In factual support of those arguments, Perry stated in a Declaration (par. 16):

> Prior to the hearing on this appeal, Pac-Tec submitted the brief to another patent law firm for review. The opinion of that firm, as reported to me by Pac-Tec, was that *the other firm regarded Pac-Tec's chances of success on the appeal as 50-50.* Pac-Tec did not report to me that the other firm considered the appeal, as to any issue, to be frivolous. [Emphasis added]

This Declaration was included as Appendix I to Perry's Petition for a Writ of Certiorari, No. 90-1407, A49, and was referred to in the Petition itself at pages 4 and 11.

In its Cross-Petition, Pac-Tec implied that Perry's Declaration was false. Cross-Pet. at 6-7. Pac-Tec said:

> Contrary to the assertions of Perry in his Declaration, which was relied on in the petition for certiorari, the independent counsel deemed that Perry had "not made sufficient showing of error to obtain a reversal."

In support of this misleading contradiction of Perry's truthful Declaration, Pac-Tec cited a letter from Thomas E. Anderson to

Haig Avedisian (both of whom are now representing Pac-Tec in this Court).[1] However, Anderson has since admitted that:

(1) Anderson's letter was written not when his opinion was first given orally to Pac-Tec and transmitted orally to Perry, but was in fact written on the same day the appeal was argued by Perry in the Federal Circuit;[2]

(2) Perry never saw Anderson's letter until the Cross-Petition was filed;[3]

(3) Anderson had previously told Avedisian orally that "the appeal had a 50-50 chance *at best*" (his italics);[4]

(4) Anderson never opined that any aspect of Perry's appeal on behalf of Pac-Tec was frivolous;[5]

(5) Anderson is "uncertain" as to "exactly" how his present co-counsel Avedisian characterized Anderson's opinion to Pac-Tec;[6]

(6) Anderson is "not clear" as to "exactly" what Peter Hedgewick or Doug Forrer (principals in Pac-Tec and therefore his present clients) may have told Owen Perry;[7]

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[1] The footnote citation to this letter in Pac-Tec's Cross-Petition is inaccurate. Footnote 10 on page 7 of the Cross-Petition should read "App. D, A8, *infra*."

[2] App E-A10,12. Anderson says that he was unaware of the coincidence of the dates at the time the letter was written. App E-A12.

[3] App E-A12.

[4] App E-A10.

[5] App E-A11.

[6] App E-A10.

[7] App E-A10.

(7) Therefore, "it may be" that Perry's Declaration accurately recounts what his client's officers told Perry;[8] and, finally,

(8) Anderson is "prepared to file a statement to the effect that Perry may have been told by representatives of Pac-Tec that *the chances of success were 50/50.*"[9]

In addition to these reluctant but conclusive admissions by Anderson of the misleading nature of what was said in the Cross-Petition, the Court's attention is invited to App. A-D, *infra*. In particular, none of the statements of fact in the letter from Perry's counsel to Avedisian (App. D) has been denied by Avedisian or by any of the principals of Pac-Tec.

* * * * *

Ordinarily, the kind of extra-record factual dispute that has occurred in this case might weigh against this Court's granting a Petition for a Writ of Certiorari.[10] In the present case, however, the extra-record dispute has been caused by the very error in the court below that Petitioner is seeking to have corrected.

If the Federal Circuit had afforded Perry the hearing that he requested, this factual dispute would have been raised and resolved in the court below and would not have been raised for the first time in this Court.

Pac-Tec's unsuccessful effort to make Perry's Declaration appear to have been false through the introduction of extra-record

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[8] App E-A11.

[9] App E-A11. (emphasis added). Perry has specifically asked, in a letter from his counsel to Avedisian, that this be done. App D-A8. As of the preparation of this Opposition, no such statement has been filed.

[10] Petitioner Perry's original Declaration is in the record below. However, the letter from Anderson to Avedisian that Pac-Tec included in the Appendix to its Cross-Petition, and which it used to give the misleading impression that Perry's Declaration was false, is not in the record below. Also outside the record are the letter from Safford to Avedisian, the second Declaration by Perry, and the Declarations of Safford and Snyder, all of which appear in the Appendix to this Opposition.

matter in its Cross-Petition, therefore, underscores how important it is that this Court make it clear that sanctions should not be imposed under Rule 38 without affording the parties notice and an opportunity to be heard at the circuit court level.

SUMMARY OF ARGUMENT

The Cross-Petition for a Writ of Certiorari should be granted in part and denied in part.

The Cross-Petition should be granted on the issue of whether F.R.App.P. 38 is unconstitutionally vague. On this issue, the Cross-Petition adopts by reference the arguments made in the original Petition in this case. Rule 38 does not define the critical words "frivolous," "an appeal," and "just damages." Moreover, the courts have been unable to give any consistent, coherent meanings to these words, and lawyers have been left to guess as to where proper, zealous advocacy leaves off and a frivolous appeal begins.

Since the issue of unconstitutional vagueness can be avoided by strictly construing Rule 38, however, the Court should also grant Petitioner's request that a writ be issued to decide the proper construction of the rule. First, "frivolous" should not be read to penalize an argument that is arguable on the merits. Second, "frivolous" should not be read to penalize an argument that is made in good faith. Third, at the very least, good faith should be considered by way of mitigation in determining what damages are "just." Fourth, "an appeal" should be read to refer to the entire appeal and not to some unquantified portion of it.

The Cross-Petition should also be granted on the issue of whether due process requires notice and an opportunity to be heard before penalties are assessed under Rule 38. On this issue, too, the Cross-Petition adopts by reference the arguments in the Petition.

Since the procedural due process issue can be avoided by a plain meaning reading of Rule 46(c), however, the Court should also grant Petitioner's request that a writ be issued to decide the interrelationship of Rule 38 and 46(c). Rule 38 provides for damages for filing a frivolous appeal. In addition to assessing damages of $134,000, the court below went beyond Rule 38 in publicly censuring Petitioner for alleged misconduct going beyond filing a frivolous appeal. Rule 46(c) requires notice and an

opportunity to be heard in any case of "conduct unbecoming a member of the bar" or of "failure to comply with these rules or any rule of the court." Thus, notice and hearing were required under the plain meaning of Rule 46(c).

The Cross-Petition should be denied on the issue of whether the Cross-Petitioner would remain jointly and severally liable under the Rule 38 order if that order were declared invalid by this Court. This conclusion follows as a matter of logic and common sense and does not warrant the time of this Court.

The Cross-Petition should also be denied on the Cross-Petitioner's contention that a client can never be found jointly and severally liable under Rule 38. The Cross-Petitioner failed to raise and preserve this issue in the court below.

REASONS FOR GRANTING THE CROSS-PETITION IN PART AND DENYING IT IN PART

I. FOR THE REASONS STATED IN THE ORIGINAL PETITION AND INCORPORATED BY REFERENCE IN THE CROSS-PETITION, (1) RULE 38 IS UNCONSTITUTIONALLY VAGUE AND (2) DUE PROCESS REQUIRES NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE SANCTIONS CAN BE IMPOSED.

The original Petition for a Writ of Certiorari in this case (No. 90-1407) has shown that F.R.App.P. 38 is unconstitutionally vague. Petition at 27-28. The Cross-Petition has incorporated this argument by reference. Cross-Petition at 15. The Petition and Cross-Petition should be granted on this issue.

Rule 38 does not define the critical words "frivolous," "an appeal," and "just damages." Moreover, the courts have been unable to give any consistent, coherent meanings to these words, and lawyers have been left to guess as to where proper, zealous advocacy leaves off and a frivolous appeal begins.

The original Petition also points out, however, that the issue of unconstitutional vagueness can be avoided by strict construction of Rule 38. First, "frivolous" should not be read to penalize an argument that is arguable on the merits. Petition at 10-14. Second, "frivolous" should not be read to penalize an argument that is made in good faith. Petition at 15-17. Third, at the very least, good faith should be considered in mitigation in determining what damages are "just." Petition at 17. Fourth, "an appeal" should be read to refer to the entire appeal and not to some unquantified portion of it. Petition at 17-19.

The original Petition has also shown that due process requires notice and an opportunity to be heard before sanctions can be applied under Rule 38. Petition at 19-22, 24-26. The Cross-Petition has also incorporated this argument by reference. Cross-Petition at 14. The Petition and Cross-Petition should be granted on this issue.

The Petition also points out, however, that the procedural due process issue can be avoided by recognizing that Rule 46(c) requires notice and an opportunity to be heard before sanctions can be imposed under Rule 38. Petition at 22-24. Rule 38 provides for damages for filing a frivolous appeal. In addition to assessing damages of $134,000, the court below went beyond Rule 38 in publicly censuring Petitioner for alleged misconduct going beyond filing a frivolous appeal, including "deceit." Rule 46(c) requires notice and an opportunity to be heard in any case of "conduct unbecoming a member of the bar" or of "failure to comply with these rules or any rule of the court." Thus, notice and hearing were required under the plain meaning of Rule 46(c), which avoids the need to decide the issue of constitutional due process.

In addition to granting the Petition and the Cross-Petition to review the constitutional issues raised in this case, therefore, the Court should also grant the Petition to review the important issues of interpreting the relevant rules, which could preclude the necessity for reaching the constitutional issues. *In re Snyder*, 472 U.S. 634, 642, 105 S.Ct. 2874, 2880 (1985).

II. BECAUSE A DECISION HOLDING THE SANCTIONS ORDER INVALID WOULD NECESSARILY RELIEVE THE CROSS-PETITIONER CLIENT OF ITS JOINT AND SEVERAL LIABILITY UNDER THE SAME INVALID ORDER, IT IS UNNECESSARY TO GRANT A WRIT OF CERTIORARI ON THIS ISSUE.

The Petitioner (a lawyer) and the Cross-Petitioner (his former client) have been found jointly and severally liable for $134,000 under the Rule 38 order of the court below. The original Petition has shown that the Rule 38 order is invalid because it has been issued in violation of the Constitution and the Federal Rules of Appellate Procedure. Petition at 19-26.

Cross-Petitioner appears to seek a Writ of Certiorari in part on the issue of whether it would continue to be liable under the order of the court below even if that order were declared invalid

by this Court. As a matter of logic and common sense, the Cross-Petitioner would not be liable for damages under an order that this Court held to be invalid. Accordingly, this issue does not appear to warrant the attention of this Court, and the Cross-Petition should be denied on this issue.

III. A WRIT OF CERTIORARI SHOULD BE DENIED ON THE ISSUE OF WHETHER RULE 38 PERMITS A COURT OF APPEALS TO AWARD SANCTIONS AGAINST THE CLIENT AS WELL AS AGAINST THE LAWYER, BECAUSE THE CROSS-PETITIONER FAILED TO RAISE AND PRESERVE THIS ISSUE IN THE COURT BELOW.

The Cross-Petition raises the issue in this Court — which it failed to raise in the court below — that Rule 38 should be construed to preclude any award of damages against a client.[11]

The Cross-Petitioner is effectively raising this issue simultaneously in state court by suing its former attorney (Petitioner) in malpractice, seeking reimbursement for any loss it might suffer through its joint and several liability under the Rule 38 order. *Pac-Tec v. Reising, Ethington, Barnard, Perry & Milton*, Cir. Ct., Cty. of Oakland, Michigan, No. 91-408911. In that forum, an

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[11] Pac-Tec's Objections to Amerace's Application For Fees, pages 8-10, filed in the Federal Circuit June 12, 1990. Although Cross-Petitioner referred to its reliance on the advice of counsel, it summed up its argument in the Federal Circuit by saying: "Thus, Pac-Tec requests this Court to reduce the attorney's fees to one quarter of that requested and reduce the expenses by eliminating the amounts set forth above in the amount of $16,008.55." (Objections at p. 9) Under "CONCLUSION" Cross-Petitioner asked only that the Federal Circuit "award Amerace reasonable attorney's fees and double costs as set forth above." (Objections at p. 10) Thus, Cross-Petitioner asked only that the court below reduce the amount of its joint and several liability, and nowhere made the argument that it now raises for the first time — that in light of what it claims to be the "goals" and "purposes" of Rule 38, it cannot be held jointly and severally liable under that rule.

appropriate factual determination can be made as to the comparative fault of the parties, if any.[12]

Cross-Petitioner acknowledges its failure to raise the issue in the Federal Circuit and attempts to justify this omission by stating that it was "unable" to address the issue because the court seemed "ill disposed to any application for reconsideration." Cross-Petition at 13. At that time, Cross-Petitioner had discharged Petitioner as its attorney and was being represented by the same attorneys who now represent it in this Court. Petition, App. H.

Cross-Petitioner's inference of a court's "ill disposition" is hardly an excuse for failing to take the elementary step of preserving an issue for appeal.[13] The fact that Petitioner was able to make an appropriate record in this very case is convincing demonstration of the flimsiness of Cross-Petitioner's excuse for having failed to do the same.

Like Cross-Petitioner here, the Government in *Demarest v. Manspeaker*, __ U.S. __, 111 S. Ct. 599 (1991), attempted to raise an issue of statutory interpretation without having preserved it below. In a unanimous opinion by Chief Justice Rehnquist, this Court held: "The Government did not raise this question in the courts below, and we decline to consider it here for the first time." 111 S.Ct. at 603.

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[12] The state litigation underscores the continuing harm to Perry that is being caused by the Federal Circuit's harsh censure of Perry in its Rule 38 Order. The complaint in that litigation characterizes the Federal Circuit's condemnation of Perry as "the most vitriolic commentary" and supports the malpractice claim with direct quotes from it. App A-A2 .

[13] In the words of Chief Justice Roger J. Traynor, in fulfilling his "duty to protect the interests of his client" it is the lawyer's "right to press legitimate argument and to protest an erroneous ruling." *Gallagher v. Municipal Court*, 31 Cal.2d 784, 192 P.2d 905, 913 (1948). See also *In re McConnell*, 370 U.S. 230, 236, 82 S.Ct. 1288, 1292 (1962) (It is "essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases.").

Accordingly, the Cross-Petition should be denied with respect to the contention that a client should never be held jointly and severally liable for damages under Rule 38.

CONCLUSION

For these reasons,

(1) The Petition and the Cross-Petition should be granted with respect to whether Rule 38 is unconstitutionally vague and should be granted with respect to whether due process requires notice and an opportunity to be heard before sanctions are imposed under Rule 38;

(2) The Petition should be granted with respect to whether Rule 38 should be strictly construed to eliminate its vagueness and should be granted with respect to whether Rule 46(c) requires notice and an opportunity to be heard before sanctions can be imposed under Rule 38; and

(3) The Cross-Petition should be denied with respect to whether Cross-Petitioner would be liable under an invalid order and should be denied with respect to whether damages against a client are precluded under Rule 38.

Respectfully submitted,

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Appendix A

DECLARATION OF OWEN E. PERRY

Owen E. Perry makes the following declaration under the penalties of perjury:

1. I have been a member of the District of Columbia and Michigan bars since 1959 and 1964, respectively. I am admitted to practice in the Eastern District of Michigan, the Fifth, Sixth, Eleventh, District of Columbia and Federal Circuit Courts of Appeal, the Supreme Court of the United States, and the United States Patent and Trademark Office.

2. Until May 10, 1990, I represented Pac-Tec, Inc. in *Pac-Tec v. Amerace Corporation.*

3. On at least two occasions while Pac-Tec's appeal to the Federal Circuit was pending, Pac-Tec informed me that Mr. Thomas E. Anderson, Pac-Tec's current patent counsel, had reviewed the matter and advised Pac-Tec that its chances for success on appeal were 50/50. One such occasion was at a meeting in my office in late 1989. Those present included Peter Hedgewick, Douglas Forrer and Haig Avedisian, Pac-Tec's general counsel. Messrs. Hedgewick, Forrer and Avedisian were directors of Pac-Tec. Another occasion was during a later meeting with Mr. Hedgewick at my office after Pac-Tec's Reply Brief was filed on January 10, 1990 and before the oral argument on March 5, 1990. We discussed the briefs and other matters unrelated to the appeal. Mr. Hedgewick repeated to me that Mr. Anderson had advised that Pac-Tec's chances on appeal were 50/50.

4. I deny that I ever advised Pac-Tec that it would "certainly succeed in obtaining a reversal by the Federal Circuit" as represented in the Cross Petition at p. 5. I did provide the advice noted in my January 15, 1990 letter to Pac-Tec's auditors (Appendix E to the Cross Petition), but I also explicitly told Pac-Tec that I could not guarantee a favorable result.

5. I never advised Pac-Tec against attempting to negotiate settlement. I explicitly encouraged an attempt at settlement, but expressed pessimism because of Amerace's previous demands for settlement terms that had consistently been unacceptable to Pac-Tec.

6. *Pac-Tec v. Amerace* was the first case argued in the morning session of the Federal Circuit on March 5, 1990. The argument concluded by approximately 11:00 a.m. Mr. Forrer and another Pac-Tec representative were present.

7. I note that Mr. Anderson's letter (App. D to Pac-Tec's Cross Petition) is dated March 5, 1990, the same date as the oral argument in the Federal Circuit. I was unaware of that letter until I received a copy of the Cross Petition.

8. On April 23, 1991 Pac-Tec filed a legal malpractice complaint against me and my firm in the Oakland County (Michigan) Circuit Court, Case No. 91-408911. The complaint characterizes the Federal Circuit's condemnation of me as "the most vitriolic commentary" and supports the malpractice claim with direct quotes from it.

/s/
Owen E. Perry

Date: April 29, 1990

Appendix B

DECLARATION OF RALPH R. SAFFORD

Ralph R. Safford makes the following declaration under the penalties of perjury:

1. I have been a member of the State Bar of Michigan since 1974 and am admitted to practice in the Eastern and Western Districts of Michigan, the Sixth Circuit Court of Appeals and the Supreme Court of the United States.

2. I am, and have since June 7, 1990, been acting as, counsel for Owen E. Perry in connection with *Pac-Tec, Inc.* v. *Amerace Corporation*.

2. I supervised the preparation of the Declaration of Owen E. Perry ("Perry Declaration") filed in the Federal Circuit on June 27, 1990 in support of Mr. Perry's Motion for Leave to Intervene and for Other Relief. A copy of the Perry Declaration was submitted as Appendix I to Mr. Perry's Petition for Writ of Certiorari.

3. Paragraph 16 of the Perry Declaration states as follows:

> Prior to the hearing on this appeal, Pac-Tec submitted the brief to another patent law firm for review. The opinion of that firm, as reported to me by Pac-Tec, was that the other firm regarded Pac-Tec's chances of success on the appeal as 50-50. Pac-Tec did not report to me that the other firm considered the appeal, as to any issue, to be frivolous.

4. These statements were based upon Mr. Perry's statement to me that on at least two separate occasions Pac-Tec had informed Mr. Perry that Pac-Tec had retained Thomas E. Anderson (Pac-Tec's present patent counsel) to review the briefs filed in the appeal and provide a "second opinion" on the likelihood that the appeal would be successful. Mr. Perry stated that on both occasions he was informed that Mr. Anderson regarded the chances of success of the appeal as 50/50. Mr. Perry also told me that he had not been informed by anyone that Mr. Anderson believed the appeal to be frivolous.

5. At two separate meetings, the first prior to the filing of the Perry Declaration in the Federal Circuit and the second prior to filing the Petition for Writ of Certiorari, Haig Avedisian, general counsel for Pac-Tec, Inc., confirmed to me that Mr. Anderson had been retained for a second opinion and had told Mr. Avedisian that he regarded the chances of success of the appeal as 50/50.

6. On another, separate, occasion prior to the filing of the Petition for Writ of Certiorari, Mr. Anderson confirmed to me in a telephone conversation that he had made the statement attributed to him by Mr. Avedisian.

7. After reviewing Pac-Tec's Cross Petition for Writ of Certiorari, I wrote a letter to Mr. Avedisian on April 12, 1991, a copy of which is included in Mr. Perry's Brief in Opposition to Pac-Tec's Cross-Petition for Writ of Certiorari as Appendix D. Mr. Avedisian has not denied any of the facts stated in my letter. On April 22, 1991 I received a letter from Mr. Anderson, a copy of which is included in the Brief in Opposition as Appendix E.

/s/

Ralph R. Safford

Dated: April 29, 1991

Appendix C

DECLARATION OF GEORGE E. SNYDER

George E. Snyder makes the following declaration under the penalties of perjury:

1. I have been a member of the State Bar of Michigan since 1961 and am admitted to practice in the Eastern and Western Districts of Michigan and the Sixth Circuit Court of Appeals.

2. I am a partner in the firm of Meyer, Kirk, Snyder & Safford, and I attended a meeting in Haig Avedisian's office with my partner, Ralph Safford, on January 31, 1991.

3. At this meeting, Mr. Avedisian described a Pac-Tec board of directors meeting which was held while the appeal in *Pac-Tec* v *Amerace* was pending (and before oral argument) during which the three Pac-Tec directors considered whether to continue or abandon the appeal. Mr. Avedisian reported that another patent lawyer, Thomas Anderson, had been asked for a second opinion. Mr. Avedisian stated to us that Mr. Anderson had evaluated the likelihood of success on appeal as 50/50. Mr. Avedisian told us that he remarked at the meeting he did not like 50/50 chances and tried to convince the other two directors to abandon the appeal.

/s/

George E. Snyder

Dated: April 29, 1991

Appendix D

[LETTERHEAD OF MEYER, KIRK, SNYDER & SAFFORD]

April 12, 1991

VIA MESSENGER

Mr. Haig Avedisian
401 South Woodward
Suite 450
Birmingham, MI 48009

Dear Haig:

This will confirm our telephone conversation of yesterday.

I called to inform you that we were surprised and appalled by certain misstatements of fact contained in the Cross-Petition for Writ of Certiorari which you and Tom Anderson filed on behalf of Pac-Tec. I told you that, in addition to the seriousness of the factual misstatements themselves, the creation of a factual dispute between Owen Perry and his former client in the Supreme Court on matters not of record could seriously jeopardize whatever chance we might have that our petitions receive favorable consideration by the Court.

I told you I would write you immediately to outline the misstatements, the first and most serious of which I mentioned in our telephone discussion:

1. Pages 6-7 of the Cross-Petition contains the following assertion:

> "Contrary to the assertions of Perry in his Declaration, which was relied on in the petition for certiorari, the independent counsel deemed that Perry had 'not made sufficient showing of error to obtain a reversal' ".

This statement falsely implies that no one told Owen about Tom Anderson's assessment that the chances of success on appeal were 50-50. It also falsely implies that Owen had prior knowledge

of Tom's March 5, 1990 letter, and that Owen came up with the 50-50 evaluation himself by interpreting Tom's letter.

As you know, and as you acknowledged again yesterday, you told me, on two earlier occasions, that Tom made the statement described in Owen's Declaration. As you probably also know, Peter Hedgewick told Owen on at least two occasions that Tom believed the chances of winning the appeal were 50-50. Tom has acknowledged to me he had so informed Pac-Tec.

2. As you also must know, Owen had never seen Tom's March 5, 1990 letter (nor had we) prior to its having been attached to your Gross-Petition. To imply otherwise, as you have done, seriously misleads the Court and does an unjustified disservice to both Owen and his current counsel.

3. It is also incorrect to state that "Pac-Tec became aware for the first time of the Federal Circuit's view of its appeal and its counsel's conduct in the maintenance of the appeal when it received the Federal Circuit's Opinion dated May 9, 1990." Cross-Petition, p. 13. Doug Forrer attended the oral argument and was well aware of Judge Markey's attitude and comments.

4. It is misleading for you to attach the March 5, 1990 letter, implying that this is the only advice received from Tom on the appeal, and then to fail to point out to the Court that the oral argument was held the same day the letter was written. Surely you and Tom are not denying that the letter was written and sent after you heard from Doug Forrer about the oral argument.

5. It is a misstatement for you to cite the Perry Declaration for the proposition that Owen stated that "he would certainly succeed in obtaining a reversal by the Federal Circuit." Cross-Petition, p. 5. Such a statement appears nowhere in the Declaration, and cannot be fairly inferred from what is contained in it.

6. It is a misstatement for you to state "[a]s is evidenced from the record of the trial court proceedings and from the Federal Circuit record, Pac-Tec has been led and seduced into a litigation process which no conscionable and competent attorney

would have undertaken." Cross-Petition, p. 8. The record is devoid of any evidence on these issues, and you have cited none. The malpractice case, which you have said you will shortly be filing, will obviously deal with such claims, but it is highly improper to introduce these irrelevant, unsupported assertions in your cross-petition and to suggest that they are supported by the record.

7. You make other assertions of fact in the Cross-Petition which are not in the record:

a. "After the filing of the briefs in the appeal, Pac-Tec was concerned as to whether Perry's optimistic expectation of success were (sic) accurate." p.6

b. "Unfortunately, the appeal had proceeded to a point beyond which a settlement could be negotiated." p. 7 (This statement, in light of the pending settlement negotiations, is also incorrect.)

c. "Furthermore, Perry overcame any misgivings Pac-Tec may have had and Pac-Tec was persuaded by Perry not to withdraw the appeal." p. 7

d. "Pac-Tec is now struggling for its existence." p. 8

It is extremely important that the misstatements of fact be promptly corrected, and that the Court be specifically advised that Owen Perry's Declaration is not false. Rule 15.1 of the Supreme Court Rules requires us to advise the Court of any misstatements of fact contained in the Cross Petition. We will do so if we must, but as I told you I wanted first to give you the opportunity to correct the misstatements of fact and the unsupported factual assertions yourself.

It is also important that Ron Sandler be promptly advised of this so that he does not use this apparent factual dispute as a basis for opposing either petition.

Because of the seriousness of this matter, and the deadline for our opposition brief, may I please hear from you as soon as possible.

Yours very truly,

/s/ RALPH R. SAFFORD

RRS:bfb

cc: Monroe H. Freedman
Owen E. Perry

Appendix E

[LETTERHEAD OF GIFFORD, GROH, SPRINKLE, PATMORE & ANDERSON, P.C.]

April 22, 1991
Our File: PTH-150/8

VIA FACSIMILE

Ralph R. Safford
Meyer, Kirk, Snyder & Safford
100 W. Long Lake Rd.
Suite 100
Bloomfield Hills, MI 48010

Re: Pac-Tec, Inc. v. Owen E. Perry et al
No. 90-1525

Dear Ralph:

This letter is written in response to your letter of April 12, 1991 to Haig Avedisian. My opinion of the Appeal Brief was first given orally to Haig Avedisian. Haig recalls that I told him that the appeal had a 50/50 chance *at best* and that I gave several grounds for a likely denial of the appeal. I do not recall discussing percentages during my conversation with Haig prior to the written opinion. I do recall specific criticisms which were made of the brief and delivering those criticisms to Haig.

I did not have any direct contact with anyone at Pac-Tec other than Haig Avedisian prior to the Federal Circuit's Opinion dated May 9, 1990. I was not present at any conversations which Haig had with Pac-Tec, so I am uncertain as to exactly what his characterization of my opinion was to Pac-Tec. Further, I am not clear on exactly what Peter Hedgewick or Doug Forrer may have told Owen Perry.

Nevertheless, we do not deny in our brief that Perry may have been told by Pac-Tec that my opinion was that the chance of success on appeal was 50/50. The point made in the brief is that my opinion of the chances of success was that Perry had "not made sufficient showing of error to obtain reversal".

It appears that the reason that my opinion is referred to in your brief is to bolster an argument that other attorneys did not consider the appeal frivolous. Although I did not venture an opinion as to whether the appeal was frivolous or not, I do recall orally telling Haig that Perry's brief was so difficult to comprehend that I was unable to understand the issues until I read the Appellee's Brief. Additionally, I informed Mr. Avedisian that there were some severe substance problems.

Since my opinion has been put at issue by Mr. Perry, we were entitled to clarify the nature of my opinion. In making the statement in his affidavit, Perry was relying on either Forrer or Hedgewick's restatement of Avedisian's characterization of my opinion. I do not know what Mr. Hedgewick told Mr. Perry. It is possible that Mr. Perry took Mr. Hedgewick's statement out of context, or it may be that Mr. Perry's statement is an accurate representation of what Mr. Hedgewick told Mr. Perry. However, the statement does not accurately reflect the nature of my opinion. Mr. Perry was relying on hearsay and as a result, he has placed himself in the position that he now finds himself with respect to this statement.

With respect to particular concerns raised by your letter, first, our statement does not falsely imply that "no person told Owen about Tom Anderson's assessment that chances of success on appeal were 50/50". That is merely the inference which you take from the statement. However, to the degree that such an inference is possible, we are prepared to file a statement to the effect that Perry may have been told by representatives of Pac-Tec that my opinion was that the chances of success were 50/50. We do not believe, however, that my opinion was that as represented by Perry's declaration. In making our clarification, we will

also indicate that Perry did not see the written opinion prior to the filing of our Cross-Petition.

With respect to points 3 and 4 of your letter, we are uncertain as to Doug Forrer's impression of what the argument was; however, as an attorney that has appeared before the Federal Circuit, I cannot say that anyone, including an attorney, can accurately judge the Court's opinion of an appeal at the time of oral argument. Further, I had no communication of any kind with Doug Forrer or Peter Hedgewick prior to May 10th. Further, I had no information regarding when the oral argument was being held or that Doug Forrer was in attendance prior to May 10, 1991. In fact, until your letter of April 12th, I did not even realize that the oral argument was held on the same date that my letter was written. Therefore, I categorically deny that my letter was written and sent out after having any information from Doug Forrer about the oral argument.

With respect to point 5 of your letter, it appears that we incorrectly cited the Perry declaration rather than the Perry opinion letter which was set forth as Appendix E of our Cross-Petition. We do not believe that there is any change in the substance of the brief, however, we will correct the citation in the footnote.

With respect to points 6 and 7, we concede that the record is not complete with respect to these points. The record is not complete because we have not had an opportunity to make a

record as far as these areas. In fact, we are seeking an opportunity, by our Cross-Petition, to have a forum in which we may make a record on these points. However, without apprising the Court of the possible record which could be made, it is impossible for us to set forth our position. Therefore, we do not feel it necessary to take any steps to alter or amend our petition with respect to these areas. Of course, you may file a response in opposition to our Cross-Petition and raise this as an issue.

Very truly yours,

/s/ THOMAS E. ANDERSON